



PUBLIC NOTICE

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WIRELINE COMPETITION BUREAU SEEKS COMMENT ON APPLYING THE *QWEST PHOENIX FORBEARANCE ORDER* ANALYTIC FRAMEWORK IN SIMILAR PROCEEDINGS

WC Docket Nos. 06-172, 07-97

Comments Due: August 23, 2010

Replies Due: September 22, 2010

In a number of forbearance petitions over the past few years, incumbent local exchange carriers (LECs) have argued that increasing competition in the provision of traditional telephony and other communications services, particularly from cable and mobile wireless providers, justifies forbearance from certain longstanding rules designed to promote competition and/or to protect customers from excessive prices. Today, the Commission released the *Qwest Phoenix Forbearance Order*, the most recent decision addressing a forbearance petition of this type.¹ In that order, the Commission found it appropriate to employ a market power analysis, similar to the analysis the Commission has used many times in the past to determine whether competition has increased sufficiently to render certain regulatory protections no longer necessary.² The Commission found this analysis to be well-designed to protect consumers, promote competition, and stimulate innovation.³ Noting that the party petitioning for forbearance bears the burdens of production and persuasion, the Commission concluded that Qwest had failed to demonstrate that it lacked market power in the relevant product and geographic markets and thus denied the requested forbearance relief.⁴

While finding that Qwest had not met its burden in that instance, the Commission recognized that “the marketplace is changing, as technology, prices, product characteristics, and consumer preferences

¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 (rel. June 22, 2010) (*Qwest Phoenix Forbearance Order*).

² See, e.g., *id.* at para. 37.

³ *Id.* at para. 3.

⁴ *Id.* at paras. 2-3, 14, 92. Among other things, the Commission: (1) observed that the petitioner has the burden of proof—including both the burden of production and persuasion—when it files a forbearance petition; (2) distinguished this type of forbearance from those involving advanced services, which directly implicate the goals of section 706 of the Telecommunications Act of 1996, and where it is necessary to take into account how such newer markets continue to evolve and develop; and (3) recognized the need to make predictions about the future state of the marketplace if existing regulations were eliminated as proposed by the petitioner, and finding a number of shortcomings in the prior approach to that analysis used in similar forbearance proceedings, beginning with the *Qwest Omaha Forbearance Order*. See *id.* at paras. 14, 24-37, 39, 92.

evolve.”⁵ Among other developments, cable television providers are increasingly providing telephone service to consumers and business customers, and consumers are increasingly “cutting the cord” by terminating traditional land line telephony service and relying entirely on mobile phone service.⁶ The Commission’s forbearance decisions should take account of the degree to which these and related developments may bear on the market power analytical framework the Commission has adopted, as the agency works to implement Congress’s instructions to reduce regulatory burdens on telecommunications providers by exercising our forbearance authority in appropriate circumstances.⁷

In this Public Notice, we seek comment on the application of the analytical framework used in the *Qwest Phoenix Forbearance Order* to other, similar requests for regulatory relief, including the pending remands of the *Verizon 6 MSA Forbearance Order* (WC Docket No. 06-172) and the *Qwest 4 MSA Forbearance Order* (WC Docket No. 07-97) (together, remand proceedings).⁸ In this connection, we recognize that the state of competition may vary from area to area and from market to market. The conclusions reached by applying the market power framework set forth in the *Qwest Phoenix Forbearance Order* likewise may vary based on differing evidence regarding the state of competition. We thus encourage the petitioners in the remand proceedings, and other interested persons, to update the record in each of those proceedings with additional data and other evidence that would show whether forbearance is warranted under this analytic framework.⁹

In addition, we recognize that the evidence in a particular forbearance proceeding may indicate that the petitioner lacks market power for some but not all of the relevant products under consideration.¹⁰ We seek comment on the policy and administrability questions posed in such circumstances and on the best ways accurately and effectively to tailor regulatory relief to the particular services in a particular market that are subject to competition and meet the section 10 criteria.¹¹

⁵ *Id.* at para. 3.

⁶ See INDUST. ANALYSIS & TECH. DIV., FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2008, at Table 5 (rel. July 2009) (reporting increasing subscription rates for cable telephony); *Qwest Phoenix Forbearance Order* at para. 55 & n.164 (reporting increasing subscription rates for mobile wireless substitution).

⁷ 47 U.S.C. § 160; see also Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as “[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

⁸ *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21294, para. 1 (2007) (*Verizon 6 MSA Forbearance Order*), remanded, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11730, para. 1 (2008) (*Qwest 4 MSA Forbearance Order*), motion for voluntary remand granted, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009).

⁹ Parties are free to submit different evidence, beyond that submitted in the record of the *Qwest Phoenix Forbearance Order*, that the Commission might want to consider in evaluating whether a petitioner, either individually or jointly with other service providers, possesses market power in the relevant product markets.

¹⁰ *Qwest Phoenix Forbearance Order* at para. 44.

¹¹ For example, if there were evidence of sufficient competition for residential voice service, the Commission would need to consider whether, or how, forbearance from unbundling obligations could be tailored given that unbundled

It is our expectation that the comments generated through this Public Notice will help ensure that the Commission's approach, both in resolving the remand proceedings and similar future forbearance proceedings, not only will be rigorous and data-driven, but also will reflect a forward-looking approach to competition and the best understanding of ways to appropriately tailor any regulatory relief. Our objective is to ensure complete records so that forbearance can be granted in cases where the petitioner has demonstrated that sufficient competition exists to meet the statutory criteria.

Interested persons therefore have until **August 23, 2010** to file comments, and until **September 22, 2010** to file replies, in response to this Public Notice in these dockets. All other filing requirements set forth in the Public Notices establishing the initial pleading cycles remain in effect.¹²

For further information regarding this proceeding, contact Denise Coca, Wireline Competition Bureau, (202) 418-0574 or Tim Stelzig, Wireline Competition Bureau, (202) 418-0942.

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DS0 loops are used to serve not only residential customers but also businesses, and are used to provide not only voice service but bundles of communications services.

¹² See *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, Public Notice, 24 FCC Rcd 10881, 10884-86 (WCB 2009).